



The Comptroller General  
of the United States

Washington, D.C. 20548

*Lebowitz*

## Decision

**Matter of:** 120 Church Street Associates--Reconsideration

**File:** B-232139.4

**Date:** May 23, 1989

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### DIGEST

Prior dismissal of protest alleging solicitation deficiencies is affirmed where protest is not filed with the General Accounting Office until after "the close of business," the closing time for receipt of best and final offers, at the agency. While the protester alleges that agency employees voluntarily work beyond the hours fixed by the agency as the official work day, "close of business" is considered to be the time the agency established that working hours end and the agency no longer conducts government business with the public on that day.

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### DECISION

120 Church Street Associates (CSA) requests that we reconsider our decision in 120 Church Street Associates, B-232139.3, Mar. 7, 1989, 89-1 CPD ¶ 246, in which we dismissed as untimely CSA's protest of alleged deficiencies in solicitation for offers (SFO) No. MNY-88-284, issued by the General Services Administration (GSA) for the acquisition of leased office space in Manhattan, New York for the Internal Revenue Service (IRS).

We affirm our dismissal.

In its protest, CSA, the incumbent landlord, primarily argued that there is no rational basis for the SFO building occupancy requirement establishing a preference for early delivery of the building because on December 21, 1988, GSA signed a 5-year lease with CSA, which requires GSA to continue its tenancy for a minimum of 42 months, until June 30, 1992. Furthermore, CSA argued that the required occupancy date under the SFO, approximately 2 years after the SFO is awarded and approved floor plans are received, is unduly restrictive of competition and in light of the lease, will result in the government's leasing and paying rent for two buildings during a concurrent period of time. In

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addition, CSA argued that the air conditioning requirements in the SFO, as amended, are ambiguous.

We dismissed CSA's protest as untimely without considering the merits. Our Bid Protest Regulations provide that a protest based upon alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of proposals must be filed prior to the closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1988). Alleged improprieties which do not exist in the initial solicitation, but which are subsequently incorporated into the solicitation, must be protested no later than the next closing date for receipt of proposals following the incorporation. Here, the SFO, as amended, stated that the closing date for receipt of best and final offers (BAFOs) at the GSA Regional Office in New York was "the close of business" on February 13, 1989. GSA submitted a current order showing that the working hours at this GSA regional office are 8:15 a.m. to 4:45 p.m. GSA also advised our Office that CSA timely submitted its BAFO at 4:41 p.m. on February 13. However, we dismissed CSA's protest as untimely because our Office's time/date stamp established that CSA's protest was filed with our Office at 4:48 p.m. on February 13, 3 minutes after the closing time for receipt of offers at GSA, as established by the GSA order.

We also held that CSA's protest did not fall within the significant issue exception to our timeliness rules, 4 C.F.R. § 21.2(b) (1988), because CSA's protest did not raise a matter of widespread interest to the procurement community or involve a matter that has not been considered on the merits in a prior decision. See Christoph's Research and Design Systems, Inc., B-232966, Dec. 12, 1988, 88-2 CPD ¶ 585; Hunter Environmental Services, Inc., B-232359, Sept. 15, 1988, 88-2 CPD ¶ 251.1/

On reconsideration, CSA relies on Federal Systems Group, Inc., General Services Administration Board of Contract Appeals, No. 9240-P, Nov. 23, 1987, reprinted in 88-1 BCA ¶ 20,334, in arguing that its protest was timely filed with our Office by "the close of business" on February 13. In Federal Systems Group, the solicitation, issued by the Air Force for communication boards and software, provided that proposals were due no later than "the close of business" on

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1/ While CSA asserts that we overlooked its primary issue (unreasonably early occupancy date) in determining that its protest did not raise a significant issue, we in fact considered all the contentions of the protester in arriving at our decision.

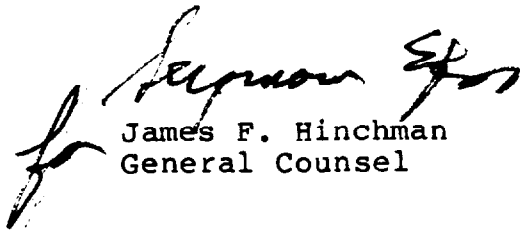
September 25, 1987. An agency regulation defined business hours for the contracting division from 7:30 a.m. to 4:30 p.m. The regulation also permitted employees to work flextime schedules. The protester's proposal, telefaxed to the contracting office, was received at 4:38 p.m. on September 25. Upon completion of the transmission, an employee working in the contracting office during his regularly scheduled duty hours called the protester to confirm receipt of the transmission. The contracting officer, however, rejected the protester's proposal as late because it was received at 4:38 p.m., 8 minutes after "the close of business." Federal Systems Group protested the rejection of its proposal as late to the Board.

In Federal Systems Group, the Board, relying on a statement made by the chief of the contracting division to the protester after its proposal was rejected that there was no established time for close of business for that office, and that "close of business" would depend on employees' flextime work schedules, held that use of the term "close of business" as the time for receipt of proposals means "proposals would be received on the specified date at any time prior to when the office closed for the day, [and] so long as an employee remained in the office during that employee's regularly scheduled duty hours, such employee would be remiss in refusing to conduct [government] business." The Board did not find controlling Federal Acquisition Regulation (FAR) § 15.412(b) (FAC 84-42) which establishes 4:30 p.m., local time, as the close of business where the solicitation does not state a specific time for receipt of proposals at the designated government office. It also did not find persuasive the agency regulation establishing business hours for the contracting division, and the fact that flextime has no effect on an office's business hours, but only allows employees to adjust their work schedules to times convenient for them. Because an employee was working in the contracting office after 4:30 p.m. and received Federal Systems Group's proposal, the Board found that the proposal was timely received by "the close of business."

The situation here is different. Unlike Federal Systems Group, where flextime schedules were available to employees, employees in GSA's Real Estate Division in New York cannot work flextime schedules. According to GSA, these employees adhere to the GSA order which establishes definite and fixed official working hours of 8:15 a.m. to 4:45 p.m., and it is during these regularly scheduled working hours that business generally is conducted with the public. In this case, we find no reason to question the agency's position that close of business at GSA's New York office officially occurs at

4:45 p.m., after which time employees are not scheduled for duty hours and are not required to conduct public business. While CSA argues that on occasion it has dealt with GSA employees by phone or in person until at least 5 p.m., these employees are working outside of official duty hours. At these times, after the close of business, these employees are not required by GSA to transact business with the public.

Accordingly, our dismissal is affirmed.



James F. Hinchman  
General Counsel